

UNITED STATES *v.* MALCOLM.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 512. Submitted January 12, 1931.—Decided January 19, 1931.

1. Under the Revenue Act of 1928, the entire community income of a husband and wife, domiciled in California, need not be returned and the income tax thereon be paid by the husband.
2. Under § 161 (a), California Civil Code, the wife has such an interest in the community income that she should separately report and pay the tax on one-half of it.

The certificate from the court below stated the facts as follows:

"Robert K. Malcolm and Esther Jarrett Malcolm are husband and wife and citizens of the United States.

Since October 1, 1920, they have continuously maintained their domicile in the State of California. During the year 1928, Robert Malcolm received a salary of $3,600 for personal services rendered as an officer of the Liberty Farms Company, a California corporation. Under the laws of the State of California, this income was community property. On March 1, 1929, the husband and wife filed separate returns of their income for federal income-tax purposes. Each reported one-half of the salary of $3,600 received in 1928 by the husband, and each fully paid the amount shown to be due on the return. It is admitted that all income taxes due from either husband or wife for the year 1928 have been fully paid, if, as a matter of law, they had a lawful right to make such separate returns under the provisions of §§ 11, 12, and 51 of the Revenue Act of 1928.

"After the husband had filed his income-tax return for the calendar year, 1928, as set out above, the Commissioner, upon an audit and examination, determined that his return was incorrect in that the salary of $3,600 should have been reported by the husband alone, and an income tax paid thereon by him, instead of both husband and wife reporting it at $1,800 on each return. Accordingly the Commissioner determined against the husband a deficiency in income tax amounting to $18.39. An assessment in this amount was then made and collected from the husband, the plaintiff herein, together with interest amounting to $1.12. A claim for refund was thereafter filed and rejected by the Commissioner. From a judgment for this amount in plaintiff's favor, the defendant has appealed."

The questions certified were as follows:

"1. Under the applicable provisions of the Revenue Act of 1928 must the entire community income of a husband and wife domiciled in California be returned and the income tax thereon be paid by the husband?

"2. Has the wife under § 161 (a) of the Civil Code of California such an interest in the community income that she should separately report and pay tax on one-half of such income?"

Solicitor General Thacher, Assistant Attorney General Youngquist, Mr. Sewall Key and *Miss Helen R. Carloss*, Special Assistants to the Attorney General, and *Mr. Erwin N. Griswold* submitted for the United States.

The Government conceded that, with respect to the particular income here in question, the interests of the husband and wife were such as to bring the case within the rulings which are cited in the *per curiam* decision, *infra*—this because of amendments of the California statutes made since *United States* v. *Robbins*, 269 U. S. 315 was decided.

Messrs. Kingman Brewster, James S. Y. Ivins, Allen G. Wright, A. J. Hill, O. R. Folsom-Jones, Joseph D. Brady, and *F. E. Youngman* submitted for Malcolm.

PER CURIAM. The first question certified is answered: No. The second question is answered: Yes. *Poe* v. *Seaborn, ante*, p. 101; *Goodell* v. *Koch, ante*, p. 118; *Hopkins v. Bacon, ante*, p. 122.